IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 66

SAN DIEGO BUILDING TRADES COUNCIL, MILLMEN'S UNION, LOCAL 2020, BUILDING MATERIAL AND DUMP DRIVERS, LOCAL 36,

Petitioners,

vs.

J. S. GARMON, J. M. GARMON AND W. A. GARMON,

Respondents.

On Writ of Certiorari to the Supreme Court of California

RESPONDENTS' BRIEF

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THE QUESTION PRESENTED

The following question is presented:

Is a state court precluded from awarding damages for nonviolent conduct found to be tortious under state law merely because the tortious conduct is also an unfair labor practice under the National Labor Relations Act, in a case where the National Labor Relations Board has declined to exercise its jurisdiction?

The petitioners, in their brief, assert that five questions are involved. These questions are for the most part alternative statements of the same question with, in some instances, an additional fact or asserted fact included.

STATEMENT OF THE CASE

This case is here for the second time. The present proceeding involves an award of damages in the amount of $1,000.00 in favor of the respondents, a partnership operating a retail lumber business with eight employees, for conduct held tortious under state law. The tortious conduct of the petitioners consisted of injuring the respondents' business by interfering with their relationship with their suppliers and their customers. The petitioners accomplished this purpose by various means, including picketing and direct pressure upon those doing business with the respondents. (R. 15.) Such conduct is a common-law tort under the law of California (as well as under the law of most, if not all, other states) unless the circumstances are such as to give rise to a privilege. No such circumstances existed in the present case.

The Supreme Court of California affirmed a judgment of the trial court granting respondents an injunction against continuance of the conduct of which they complained and awarding them damages for the injury already suffered. (R. 43.)

This Court, on certiorari, held that the California courts were without power to grant injunctive relief because the conduct in question constituted an unfair labor practice and, therefore, only the National Labor Relations Board could grant relief of a preventive nature.

However, this Court did not hold that the California courts were without power to award damages. On the contrary, it remanded the case to the California Supreme Court so that the latter might determine whether there was liability for damages under the law of California.

The California Court held that there was such liability and, therefore, affirmed the damage award. (R. 324.)

It is this action of the California Supreme Court that is now under attack by petitioners.

The petitioners' statement of the case contains outright misstatements of fact, among which the following may be noticed:

1. The respondents did not allege and the trial court did not find, as the petitioners state on page 5 of their brief, that the respondents were engaged in interstate commerce. The allegations and findings were simply to the effect that the business of the respondents affected interstate commerce, an allegation and finding that, upon proper proof, would have to be made in the case of virtually any retail or other business carried on in the United States. (R. 2, 13.)

2. The respondents in their complaint did not allege, and the trial court did not find, as the petitioners assert on page 5 of their brief, that the conduct of the petitioners was in violation of the National Labor Relations Act or the Labor Management Relations Act. Moreover, the trial court did not, as petitioners assert at the same place, grant any relief upon the ground that there had been any violation by the petitioners of either of these laws. The pleadings and findings were simply to the effect that the *respondents* would be committing an unfair labor practice if they complied with the demands of the petitioners. (R. 3, 4, 16.)

The petitioners' statement of the case also contains misstatements and distortions of the law which are covered, where material, by the discussion in the argument portion of this brief.

SUMMARY OF ARGUMENT

The rulings of this Court establish that a state court may award damages for acts that are tortious under state law even though those acts may also constitute an unfair labor practice

under the National Labor Relations Act. This rule is sound since it results in no conflict with the authority of the National Labor Relations Board, and it can not be presumed that Congress intended, by passing the National Labor Relations Act, to deprive injured parties of the right to reparation. Even in cases in which the National Labor Relations Act does afford some form of relief in the nature of reparation, this Court has nevertheless held that the state courts may award such relief and it is especially important to allow such relief in cases, such as the present, in which the National Labor Relations Board refuses to accept jurisdiction even for the purpose of awarding preventive relief.

None of the artificial limitations by which the petitioners ask this Court to restrict the rule allowing suits for damages in state courts has any justification in the decisions of this Court or in the National Labor Relations Act. Of the limitations proposed by petitioners, even if they were to be accepted, only the contention that the rule ought to be limited to cases involving violence would justify a reversal in the present case.

The decision of the court below did not violate the mandate of this Court; the mandate of this Court did not and could not contain any direction to the California Supreme Court as to how it should decide questions of state law.

ARGUMENT

I

THE DECISION OF THE CALIFORNIA SUPREME COURT WAS IN ACCORDANCE WITH THE DECISIONS OF THIS COURT ON THE ISSUES RAISED BY THE PETITIONERS

A. *This Court has held that the exclusive jurisdiction of the National Labor Relations Board applies only to preventive relief, not the award of damages or reparation.*

This Court held in *United Construction Workers* v. *Laburnum Construction Corp.*, 1954, 347 U. S. 656, 98 L. ed. 1025, that a state court is not prevented from awarding damages for tortious conduct merely because the tortious conduct is also an unfair labor practice under the National Labor Relations Act. The same rule was followed and applied in *International Union* v. *Russell*, 1958, 356 U. S. 634, 2 L. ed. 2d 1030, and *International Association of Machinists v. Gonzales*, 1958, 356 U. S. 617, 2 L. ed. 2d 1018. The reasons for the rule are stated in the opinions in the Laburnum case. The rule is sound and disposes of the present case.

Petitioners seek to distinguish the Laburnum case on various grounds. They note that the means by which the tort was carried out in this case differ from the means used in the Laburnum case. The decision in the Laburnum case, however, was not based on the particular type of tortious conduct presented. It was based upon the plain and obvious fact that Congress, in the National Labor Relations Act, did not provide any remedy by way of damages or reparation, and that, therefore, an award of damages by a state court for conduct that was tortious under state law did not conflict with the jurisdiction of the National Labor Relations Board. Thus, the court held at page 663:

> "Petitioners contend that the Act of 1947 has occupied the labor relations field so completely that no regulatory agency other than the National Labor Relations Board and no court may assert jurisdiction over unfair labor practices as defined by it, unless expressly authorized by Congress to do so. They claim that state courts accordingly are excluded

not only from enjoining future unfair labor practices and thus colliding with the Board, as occurred in Garner v. Teamsters C. & H. Local Union, 346 US 485, 98 L ed 228, 74 S Ct 161, but that State courts are excluded also from entertaining common-law tort actions for the recovery of damages caused by such conduct. The latter exclusion is the issue here."

This was the issue presented and this was the issue decided. The Court held that the Garner case did not prevent recovery of damages in state courts because:

"... In the Garner case, Congress had provided a federal administrative remedy, supplemented by judicial procedure for its enforcement, with which the state injunctive procedure conflicted. Here Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct."

Thus this Court held that it was the conflict in *procedure* that was significant in the Garner case and that, therefore, where there was no conflict the Garner case did not apply. Thus the nature of the particular toritous conduct was not in the least significant either in the statement of the issue or in the reasoning by which that issue was resolved. What was significant was the fact that, as the court went on to say:

"... For us to cut off the injured respondent from this right of recovery will deprive it of its property without recourse or compensation. To do so will, in effect, grant petitioners immunity from liability for their tortious conduct."

This is directly applicable to the present case. The petitioners here are in effect seeking immunity from liability for their tortious conduct by which they sought to and did injure the property

of the respondents. They are contending that because of the very fact that such tortious conduct is also prohibited by the National Labor Relations Act, they should be allowed to commit it without recourse or compensation, and they ask this Court to render a decision establishing that no court, board, or other agency can grant reparation for their wrongful injury to the respondents' property.

Such a result would be not only an unjust one, to be avoided rather than favored even if the intention of Congress were doubtful, but would also be contrary to the plain intent of the statute, as was pointed out by the court in the Laburnum case itself. Thus in that case the court observed:

> "The 1947 Act has increased, rather than decreased, the legal responsibility of labor organizations. Certainly that Act did not expressly relieve labor organizations from liability for unlawful conduct. It sought primarily to empower a federal regulatory body, through administrative procedure, to forestall unfair labor practices by anyone in circumstances affecting interstate commerce. The fact that it prescribed new preventive procedure against unfair labor practices on the part of labor organizations was an additional recognition of congressional disapproval of such practices. Such an express recognition is consistent with an increased insistence upon the liability of such organizations for toritous conduct and inconsistent with their immunization from liability for damages caused by their tortious practices."

We have quoted from the Laburnum case at some length because the opinion in that case is in itself an answer to the contentions of the petitioners. Other quotations could readily have been selected from the opinion.

The arguments of the petitioners are for the most part an attempt to show that the prior decisions of this Court, allowing

courts to award reparation for unlawful injuries, were incorrect. Petitioners are in effect asking that those cases be overruled or limited so severely as to deprive them of all meaning or vitality.

In the recent decisions of this Court in *International Union* v. *Russell*, 1958, 356 U. S. 634, 2 L. ed. 2d 1030, and *International Association of Machinists* v. *Gonzales*, 1958, 356 U. S. 617, 2 L. ed. 2d 1018, this Court held that even an individual employee, who is afforded a remedy by way of reparation under the National Labor Relations Act, may nevertheless also be afforded a right to damages for a tort or breach of contract under state law. A principal reason was that the remedy afforded by the federal law is not as complete as the remedy afforded by state law, since, for example, the National Labor Relations Board can not award damages for mental or physical suffering, nor can it award punitive damages. Mr. Chief Justice Warren, in his dissenting opinion in the Russell case, pointed out the significance of the fact that in that case it was an employee who was suing rather than the employer. Recognizing the fact that it is the rights of the employees that are primarily protected by the National Labor Relations Act, the Chief Justice pointed out that the Laburnum case involved an employer, and said:

> ". . . The availability of state-court damage relief may discourage the employer from invoking the remedies of the Federal Act on behalf of his employees. But that effect may be tolerated since the employer's interest is at most derivative, and there will be nothing to dissuade the employees who are more directly concerned, from using the federal machinery to correct the interference with their protected activity."

The Chief Justice further pointed out that since the wrong in the Laburnum case "was committed against an employer, the

damages exacted there were probably the extent of the defendant's liability for that particular conduct", whereas when employees are allowed to sue, there may be dozens of law suits for the same conduct.

The majority, despite these significant observations, and despite the fact that the employees, unlike the employer, can be afforded at least some reparation by the National Labor Relations Board, held that an employee could sue in a state court. *A fortiori,* a union should not be allowed to shield itself behind the National Labor Relations Act when it engages in tortious conduct against an employer.

Certainly no intention to confer such an immunity from liability on unions can be attributed to Congress. Particularly in the case of small businesses, over which the Board has made a practice of declining jurisdiction, it is clear that Congress, in enacting the provisions regarding union unfair labor practices, did not contemplate any such result. On the contrary, it contemplated that if the Board should decline jurisdiction of "petty cases that could best be settled by other means", these other means of settlement, including "litigation in court", would be left open to the parties.*

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* The question arose in connection with a provision of the original Senate bill which would have made violation of a collective bargaining agreement an unfair labor practice. (S. 1126, sec. 8 (b) (5), 1 Legislative History of the Labor Management Relations Act 1947, p. 114.) The Senate Committee Report, submitted by Senator Taft, explained:

> "The committee wishes to make it clear that by this provision and the parallel provision making contract violations by employers unfair labor practices, it is not intended that the National Labor Relations Board shall undertake to adjudicate all disputes alleging breach of labor agreements.

This Court has ruled that the state courts can not grant injunctive relief to small employers, because the National Labor Rela-

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[T]he committee anticipates that the Board will develop by rules and regulations a policy of entertaining under these provisions only such cases alleging violation of contract as cannot be settled by resort to the machinery established by the contract itself, voluntary arbitration, or if necessary by litigation in court. Any other course would engulf the Board with a vast number of petty cases that could best be settled by other means. In short, the intention of the committee in this regard is that cases of contract violation be entertained on a highly selective basis, when it is demonstrated to the Board that alternative methods of settling the dispute have been exhausted or are not available."

Senate Report No. 105, p. 23, 1 Legislative History of the Labor Management Relations Act 1947, p. 429.

The provision in question was eliminated by the committee of conference (House Conference Report No. 510, pp. 41-42, 1 Legislative History of the Labor Management Relations Act 1947, pp. 545-546). However, the foregoing explanation of the provision demonstrates the Congressional understanding that a refusal of jurisdiction by the Board would leave the courts free to act. There is nothing in the wording or history of the Act to justify a conclusion that the Congressional understanding differentiated in this respect between violations of contract and other unfair labor practices. The quoted reference to litigation in court is evidently not intended to refer only to suits in the federal courts under Section 301 of the Labor Management Relations Act, but to litigation generally in any court. Section 301 was, of course, intended (insofar as it relates to questions of jurisdiction rather than of substantive law) only to surmount the normal restrictions on the statutory jurisdiction of the district courts, and not to confer a special jurisdiction on them denied to all other courts by reason of any preemption rule, the existence of which was not at that time realized by Congress. See the legislative history appended

tions Board could grant them similar relief, though it refuses to do so because their businesses are too insignificant from the national point of view. To go further, and hold that such enterprises can not even recover damages for the wrongs to which they are now especially exposed would be a monstrous reproach to the law and to our entire legal and judicial system.

B. *The attempts of the petitioners to limit the jurisdiction of state courts to award reparation for unlawful injuries are without support in the decisions, or in reason.*

Petitioners urge what they call "three basic standards as guides" in determining whether the rule of the Laburnum case is applicable to a specific situation. Their contentions are without support in the Laburnum decision itself or in any of the other decisions of this Court, and even if they were sound, two of them would not require a reversal in the present case.

1. *The jurisdiction of state courts is not and ought not to be limited to "traditional" common-law torts, and if it were, this case involves just such a tort.*

First, petitioners urge that decisions allowing suits for damages apply only to "traditional" common-law torts. In so urging they misapply the reference in the opinion in the Laburnum case to "traditional state court procedure for collecting damages for

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to the opinion of Mr. Justice Frankfurter in *Textile Workers Union v. Lincoln Mills*, 1957, 353 U. S. 448, 484, 1 L. ed. 2d 972, 997. There is no reason to suppose that Congress contemplated that a Board refusal of jurisdiction of an unfair labor practice defined by one of the other subdivisions of Section 9 of the National Labor Relations Act would have a different effect than a refusal of jurisdiction over a contract violation.

injuries caused by tortious conduct". It is obvious at a glance that the word "traditional", as here used, applies to the word "procedure", and does not limit the type of tortious conduct for which the traditional procedure can properly be afforded by a state court. This is not only obvious from the words actually used by the court, but it is apparent from the principle enunciated in that case, which was that the important distinction was between the traditional type of damage suit on the one hand and the equitable or statutory procedures affording preventive relief on the other.

In considering conflicts between a state court procedure and the jurisdiction of the National Labor Relations Board, the "traditional" or non-traditional character of the rule of substantive law, for violation of which the remedy is afforded, is obviously of no significance whatever. However, if the petitioners wish to ask this Court to limit the jurisdiction of state courts by holding that they cannot award damages for torts created by state statute as contrasted with the common law, they have chosen the wrong case to present that question. In California, which is a Code state, all proceedings involve statutes to some extent, and so necessarily does this one, but the principles upon which it is based are common law principles applying to all persons and not regulating merely labor-management relations.

The basic proposition of state law on which the Supreme Court of California proceeded in determining the illegality of the conduct of the petitioners under the law of California is a common law principle which has been embedded in the Codes of California without change since the enactment of the Civil Code in 1872. (California Civil Code, Section 1708.) In the words of the Supreme Court of California, that principle is that "The law

of this state imposes upon everyone the duty 'to abstain from injuring the person or property of another, or infringing upon any of his rights.'" (R. 333.) An unprivileged interference with the business of another by picketing or otherwise is a well recognized violation of this duty. Restatement of Torts, §766, et seq. Many California cases so hold. See *Imperial Ice Company* v. *Rossier*, 1941, 18 Cal. 2d 33, 112 Pac. 2d 631; *Hughes* v. *Superior Court*, 1948, 32 Cal. 2d 850, affirmed, 339 U. S. 460, 94 L. ed. 985; *James* v. *Marinship Corp.*, 1944, 25 Cal. 2d 721, 155 Pac. 2d 329, 160 A.L.R. 900.

This is the principle upon which the Laburnum case itself is based. Although in that case there were "threats" and "intimidation", the suit was not one for an assault or battery or any other injury or threat to the person or physical property of the plaintiff (which was a corporation) but an injury to its business by interfering with its relationship with its employees.

The principle thus applied by the California court in the present case and by the Virginia court in the Laburnum case reaches back to the time of the Year Books. Harper & James, The Law of Torts, §6.11, Vol. 1, p. 510; Prosser, Handbook of the Law of Torts, §107. While early cases were not numerous and the precise extent of the right was, therefore, the subject of some confusion, its continuing existence is clear. The very early cases seem for the most part to have involved violence or threats of violence or an interference with existing contract rights, but the principle was not limited to such situations. In 1707 in *Keeble* v. *Hickeringill*, 11 East 574 note (103 Eng. Rep. 1127), 11 Mod. Rep. 73, 130, 3 Salk. 9, Fort. 14, 17, 19, Holt C. J., stated the rule flatly as follows:

> "[H]e that hinders another in his trade or liveli-

hood is liable to an action for so hindering him." 11 East 575, 103 Eng. Rep. 1128.

For other early cases see also *Carrington* v. *Taylor*, 1809, 11 East 571; *Gregory* v. *Duke of Brunswick*, 1843, 6 M & G 205, 953; *Walker* v. *Cronin*, 1871, 107 Mass. 555, and cases therein cited. These and a number of other cases on the subject, including many that involved labor unions and many that did not, will be found discussed in Principles of Liability for Interference with Trade, Profession or Calling, by Sarat Basak, 1911, 27 L.Q. Rev. 290, 399. 1912, 28 L.Q. Rev. 52.

In the present case (as would generally happen in the case of picketing), there was an interference with suppliers, which, of course, involved interference with existing contract relationships. The existence of a cause of action for such interference has an even more venerable history than the cause of action for interference with a trade or business. Harper & James, The Law of Torts, §6.5, Vol. 1, p. 489, et seq.; Prosser, Handbook of The Law of Torts, Ind. ed. §106, at p. 722. See the article by Sarat Basak cited *supra*.

This principle upon which relief was granted in this case and in the Laburnum case is thus not one particularly relating to labor law or to labor unions. It long antedates the rise of labor unions. Of the cases cited above from California, the Rossier case and Hughes case did not involve labor unions while the James case did.

An unjustified interference with the business or contract relations of another is as much as "traditional common-law tort" as any other.

The cause of action found by the Supreme Court of California to exist was, therefore, an ordinary common-law tort, and the only

question to be decided by the Supreme Court of California in passing upon the question of liability under state law was whether the petitioners were entitled to a special privilege removing them from the operation of this principle. Restatement of Torts, §766; Harper & James, The Law of Torts, §6.11, Vol. 1, p. 510, 514; Prosser, Handbook of the Law of Torts, 2nd ed. pp. 735, 749-760. That court held that they were not, and the conclusion that the respondents were entitled to damages followed.

This is not, therefore, a case of a tort created solely by statute. Nor is it a case of a tort applicable solely to labor unions or of a liability based on laws or statutes relating to labor unions. It is a case in which the labor unions claim an exemption, applicable solely to labor unions, from ordinary and traditional principles of tort law applicable to everyone else.

2. *The jurisdiction of state courts is not and ought not to be limited to torts involving threats of violence.*

The second "basic standard" attributed by petitioners to the opinion in the Laburnum case is that the Laburnum case applies only to violent conduct. It is true that "threats" and "intimidation", or what Mr. Justice Douglas, dissenting, called "threats and the force of a picket line", were actually present in the Laburnum case, but as the above quotations suffice to show, the decision in that case was based upon the nature of the remedy rather than on the nature of the wrongful act. The National Labor Relations Board has no jurisdiction to award damages or reparation to an employer in any event, whether the wrong involved violence or threats of violence or not, and there is, therefore, no justification for holding that this non-existent jurisdiction is any more exclusive in the one case than in the other.

Any violence threatened in the Laburnum case was not, of course, violence to the person or physical property of the plaintiff itself. The suit in that case, like that in this, was for indirect injury to the business of the plaintiff. Even where violence or a threat of violence is involved, it would normally be impossible to show what injury resulted from the violence itself, or even from the threats, and what resulted from other means of pressure used. In the Laburnum case not all of the threats could by any interpretation be taken to imply violence, as at least one was specifically a threat of a secondary boycott. *United Construction Workers v. Laburnum Construction Corp.*, 194 Va. 872, 884. Moreover, much of the plaintiff's injury resulted from the cancellation of existing contracts and the loss of prospective contracts with mining companies because of a fear by the mining companies that their own employees might engage in work stoppages in support of the defendant union, which was a branch of the United Mine Workers, although no threats were specifically directed at the employees of the mining companies or at the mining companies themselves. No attempt was made by the Virginia court to segregate the injury resulting from this conduct from any other injury, and the opinion of this Court does not suggest that such a segregation would be necessary. In most instances it would be impossible. To allow damages only for injuries from threats of violence, would, therefore, be as impractical as it would be unreasonable.

In addition, it should be noted that if the Laburnum case were held to apply only to violent conduct or threats of violence, the decision would lose all meaning, for it is established that a state may afford even preventive relief against violent conduct. *United A.A. & A.I.W. v. Wisconsin Employment Relations Board*, 1956, 351 U. S. 266, 100 L. ed. 1162.

To hold that the National Labor Relations Act deprives a state court of the power to grant damages or reparation in the case of wrongful, but not violent, conduct would grant to the unions the very immunity which this Court in the Laburnum case correctly said Congress did not intend.

3. *The jurisdiction of state courts is not and cannot be limited to cases in which no conceivable discrepancy with the attitude of the Board could occur, and if it could be so limited, then this is such a case.*

The third and, according to petitioners, "most significant" of the three "basic standards" attributed by petitioners to this Court in its decision in the Laburnum case is that the exercise of jurisdiction by the state court must not conflict with federal laws governing labor-management relations. This is a misapprehension. The Laburnum case held that the power to award damages did not, by its very nature, conflict with the jurisdiction of the National Labor Relations Board because the National Labor Relations Board had no jurisdiction to award reparation.

The petitioners in the present case hardly attempt to argue that the award of damages in this case actually did conflict in any way with the policy of the federal law and, of course, suggest no conflict, actual or potential, with any Board order or decision.

There is, of course, no question of any activity of the petitioners being *protected* by the Act. Conduct prohibited by the Act can not be protected by it. Aside from this, protected activities are defined by Section 7 of the Act, and picketing by an outside union, not participated in, supported, or approved by any employee, is not to be found there, regardless of whether the pur-

pose be lawful or unlawful. See *Cervantes, d.b.a. Panaderia Sucesion Alonso*, 1949, 87 NLRB 877; *National Labor Relations Board* v. *Texas Natural Gasoline Corp.*, 1958, 253 F. 2d 322, *National Labor Relations Board* v. *Schwartz*, 1945, 146 F. 2d 773, 774. No relief of any kind was granted by the court below against any employee.

Even if a potential conflict with a decision or order of the Board otherwise existed, it would vanish where, as in this case, the Board has declined to act.

Conflict with the policies of the Act can hardly be urged where the conduct of which the petitioners are guilty is clearly a violation of the Act, as well as of the state law. Thus, the argument of petitioners reduces to a contention that in some other case than this some possible conflict may arise.

In order to make even this modest contention, they take the position that the California Supreme Court apparently intended its decision to apply not only to cases such as this one, where the Board has declined to act, but also where the Board has acted and afforded a remedy (necessarily merely preventive in character) or where the Board has dismissed the charge "because of an insufficiency of facts to demonstrate a violation of the Act." It would seem to be sufficient to point out that the applicability of the rules enunciated by the California Supreme Court to these other factual situations should be determined in cases presenting those factual situations. As far as the possibility of an actual conflict with a decision of the Board is concerned, there is less risk in the present case than there was in the Laburnum case itself. In that case it appeared that the Board, had a charge been filed, would have accepted jurisdiction. The same appears to have been true of the United A.A. & A.I.W. case, the Russell case, and the

Gonzales case. It is not true in the present case. Whatever remote possibility there was in those cases that the Board might have subsequently granted relief inconsistent with the ruling of the courts is not present in this case.

Having injected into their argument these hypothetical situations to which they say the California Supreme Court would apply the same rule as it did in this case, petitioners urge that in such cases (and possibly also in such cases as the present, for the argument of the petitioners is not clear on the point) some potential conflict might exist because the state courts may have a different "attitude" than the National Labor Relations Board. In effect, petitioners seem to be arguing that a state court may make a mistake of fact and thereby find that the union was guilty of a tort when in fact it was not. No doubt the possibility exists. It is also possible that the National Labor Relations Board can make a mistake. The difficulty is one that is inherent in all proceedings of a judicial nature, whether carried on by a court or by a board. It has not usually been urged, however, that the possibility of an occasional error should be eliminated by establishing a condition of uniform and impartial injustice. If such a contention has been made in other fields, it has been given short shrift by courts and legislatures, which continue to afford remedies to injured parties despite the fact that they may in rare instances be erroneously applied against innocent defendants, and despite the fact that some other injured parties may erroneously be denied the relief to which they are entitled.

It is noteworthy that this danger is not one actually presented in the present case. The acts and intentions of the petitioners in the present case were clearly established by the evidence. Such a theoretical danger is, however, present even in such cases as the

Laburnum case itself, in which the state court may be in error in determining as a matter of fact that the union committed or was responsible for violence, and it is likewise present in such cases as the Gonzales case, the Russell case, the United A.A. & A.I.W. case, *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 1942, 315 U. S. 740, 86 L. ed. 1154; *Algoma Plywood and Veneer Co.* v. *Wisconsin Employment Relations Board*, 1949, 336 U. S. 301, 93 L. ed. 691, and *International Union* v. *Wisconsin Employment Relations Board*, 1949, 336 U. S. 245, 93 L. ed. 651. All of these cases involved situations in which a state court or board could conceivably err in finding that the unions (or employers) had committed the acts for which it was held that the state courts could afford a remedy, or, except in the Algoma case, in finding the facts from which this Court concluded that the conduct involved was not protected by the National Labor Relations Act, which was a possibility to be considered in those cases as the employees participated in the wrongful conduct involved in them.

Congress, in enacting the 1947 amendments, was not in the least bit troubled by the possibility that the same factual issue might be presented to both a court and the Board and might to decided differently by the two. In certain types of cases Congress not only permitted but positively required both state and federal courts to afford damages for injuries suffered from conduct constituting an unfair labor practice. Identical legal and factual issues may be presented to the Board by an unfair labor practice charge under section 8 (b) (4) of the Act and to a court by an action for damages under section 303 of the Labor Management Relations Act, but the danger that the court might decide them differently than the Board does not impair the power of the court

to decide them. *International Longshoremen's Union* v. *Juneau Spruce Corp.*, 1952, 342 U. S. 237, 96 L. ed. 275. Thus, where the Board in an unfair labor practice proceeding found that there had been no secondary picketing, but a district court in an action under section 303 found that there had been such picketing and awarded damages, both findings were upheld by the Court of Appeals of the Sixth Circuit. *National Labor Relations Board* v. *Deena Artware, Inc.*, 1952, 198 F. 2d 645; *United Brick Workers* v. *Deena Artware, Inc.*, 1952, 198 F. 2d 637.

The petitioners are in effect urging that all of the cases in which this Court has authorized the granting of any relief against a labor union in an industry "affecting commerce" by any agency other than the National Labor Relations Board, are erroneous and should be overruled. This clearly is not in accord with the intention of Congress, which intended to prevent harmful conduct by labor unions rather than immunizing them from all restraint.

II

THE ESTABLISHED RULE ALLOWING STATE COURTS TO AWARD AN ACTION FOR DAMAGES OUGHT NOT BE LIMITED OR ABROGATED

A large part of the brief of the petitioners is devoted to urging that it is bad policy to allow suits for wrongful conduct where such conduct is also an unfair labor practice, and that Congress did not intend to allow such suits. In effect they argue that this Court should retreat from its decisions on the subject.

We submit that the decisions cited above are sound and should be adhered to. The reasons for allowing such suits were pointed out by this Court in the Laburnum case and elsewhere, and it would be presumptuous for us to repeat them here. Suffice it

to say that, as this Court has observed, a holding in accordance with the contentions of the petitioners would allow unions, as well as employers, to commit wrongful acts with complete immunity from any compulsion to make reparation for the injury caused thereby. The risk that is involved in committing an unfair labor practice, insofar as action by the Board is concerned, is for the most part limited to the danger of losing the fruits of the wrong as a result of a cease-and-desist order. Even this can not materialize unless someone files a charge. Thus the rule petitioners urge would place a premium on deliberate violation of the law by giving those who engage in such activities the hope of accomplishing their purpose thereby without incurring any risk of having to pay for the injuries they cause. This was clearly not the intent of Congress in prohibiting such acts.

Petitioners, indeed, assert at page 26 of their brief that the rule they urge would not allow deliberate wrongdoers to engage in their nefarious activities with complete impunity and that it would not deny the injured victims of such conduct the possibility of obtaining reparation because the Board may compel the payment of back pay to an employee in certain cases and because of Sections 301 and 303 of the Labor Management Relations Act "which permit the federal courts to grant damages". This power of the Board and this power accorded to the federal courts are, of course, applicable only in certain cases and do not afford injured parties any relief in other cases. Moreover, the granting of power to the federal courts to award damages in certain cases does not negate the power of state courts to award similar damages in the same types of cases and can not possibly justify any inference that Congress intended to prevent relief by way of reparation in other cases. To the contrary, Sections 301 and 303

manifest an intention that unions shall not be entitled to engage with impunity in deliberate violation of the law. By requiring the federal courts to grant relief in the cases covered by these sections (and requiring the state courts to grant relief in cases covered by section 303), even though the law would not otherwise have authorized it, Congress certainly did not intend to immunize unions or employers from all liability in other cases of unlawful conduct. This was pointed out by this Court in the Laburnum case as follows:

> "One instance in which the Act prescribes judicial procedure for the recovery of damages caused by unfair labor practices is that with reference to the jurisdiction of federal and other courts to adjudicate claims for damages resulting from secondary boycotts. In that instance the Act expressly authorizes a recovery of damages in any Federal District Court and 'in any other court having jurisdiction of the parties.' By this provision, the Act assures uniformity, otherwise lacking, in rights of recovery in the state courts and grants jurisdiction to the federal courts without respect to the amount in controversy. To recover damages under that section is consistent with the existence of jurisdiction in state courts to enforce criminal penalties and common-law liabilities generally. On the other hand, it is not consistent to say that Congress, in that section, authorized court action for the recovery of damages caused by tortious conduct related to secondary boycotts and yet without express mention of it, Congress abolishes all common-law rights to recover damages caused more directly and flagrantly through such conduct as is before us." (P. 666)

Petitioners make certain other arguments against allowing a remedy by way of reparation but these arguments do not appear to be of such a character to require an extended answer. Thus petitioners quote Section 10 of the National Labor Relations Act, and particularly refer to the statement therein that the power

of the Board "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise". This language furnishes no support for an inference that Congress intended to abolish all court remedies, for if Congress had intended such an abolition, or even had believed that such an abolition resulted from the Act, there would have been no need to provide that their existence did not affect the power of the Board.

Petitioners also quote at some length from the preamble to the National Labor Relations Act, but it is obvious from the very portion quoted by them that Congress intended to prevent injurious conduct, an intention that can clearly not be accomplished by immunizing such conduct. The same comment is applicable to their quotation from House Report, 245 H. R. 3020 (which, as subsequently amended, became the Labor-Management Relations Act of 1947.)

Petitioners also quote from the Garner case, overlooking that that case involved only preventive relief and overlooking moreover that the language they quote as to the danger of conflicting adjudications referred to conflicting orders regulating future conduct.

Petitioners cite *Weber* v. *Anheuser-Busch*, 1955, 348 U. S. 468, 99 L. ed. 546 and quote *Building Trades Council* v. *Kinard Construction Co.*, 1954, 346 U. S. 933, 98 L. ed. 423, but in a manner which leaves it unclear what application they feel those cases have to the present situation. It is at any rate certain that in neither case was this Court concerned with an award of damages.

Petitioners also cite *International Union* v. *Wisconsin Employment Relations Board*, 1949, 336 U. S. 245, 93 L. ed. 651, for

the proposition that because of the National Labor Relations Act no state can treat otherwise lawful activities falling under that Act as wrongful merely because they are undertaken by many persons acting in concert. This, if it has any application to the present case, implies, as indeed this Court held under the facts of that case, that the state courts may hold harmful conduct of unions, even in interstate commerce, to be unlawful on other grounds than the one referred to and may afford a remedy for such wrongful conduct. The conduct of the petitioners in the present case was conduct unlawful under California law, whether engaged in in concert with others or not.

Finally, petitioners cite *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 1956, 351 U. S. 652, 100 L. ed. 941, for a statement that the Act itself is applicable even if the Board refuses to enforce it. This principle might support a contention that state courts are compelled to afford a remedy for violations of the Act where the Board refuses to do so, but it can furnish no support for a contention that the states are prohibited from affording any remedy for wrongful conduct.

In brief, the petitioners have established by the authorities they cite that the National Labor Relations Act sets up principles of substantive law applicable to labor relations which the courts can not disregard. The authorities they cite do not furnish the slightest support for a contention that the states may not afford relief of the type involved here.

III

THERE WAS NO VIOLATION OF THE MANDATE OF THIS COURT

Petitioners urge that the mandate of this Court was violated

and misapplied by the California Supreme Court. One aspect of this contention seems to be that the State Supreme Court drew from the mandate an improper inference as to the views of this Court on the power of the states to award damages. This is of the same nature as the argument contained in Part IV of petitioners' brief to the effect that the California Supreme Court erred in its view as to the applicability of certain cases decided by this Court. While we believe that the petitioners are in error on these points, we will not attempt to discuss them since even if the petitioners were correct in believing that the state court in making its decision was misled by some misinterpretation of the mandate of this Court or the prior decisions of this Court, that would be no ground for reversal. The question presented here is whether the state courts have the power to grant damages under the circumstances presented, not whether the California Supreme Court gave the right reasons for holding that they have such power.

A mere misinterpretation of the mandate is, therefore, unimportant. The mandate of this Court in the prior decision would only be significant in the present case if the state court had actually violated the command of this Court. This the state court did not do unless either (1) the mandate carried an implied command to set aside the award of damages, or (2) the mandate carried an implied command to apply the views on matters of state law that the state court held at the time of its first decision in the case, rather than those it now believes to be correct, assuming there is any difference.

As to the first alternative, it is clear that the mandate did not require the state court to decide the issue of damages in any particular way, and if this Court had intended to impose such a

requirement, clearly it would simply have ordered a reversal of the award of damages rather than a remand for further consideration.

As to the second alternative, we are unable to find any implication in the mandate or opinion of this Court that the state court was to be limited in its interpretation of its own state law. The petitioners rest their contention entirely on a mere statement of fact contained in the opinion of this Court to the effect that this Court could not know how the California court "would have" interpreted state law if it had realized that it was not bound to enforce the federal law in any way. This certainly can not be tortured into a direction to the state court how it must decide that question of state law when it is presented to it. Even if such an implication were contained in the mandate, the petitioners do not suggest any possible justification for limiting the authority of the state court to decide its own law, and we submit that if there had been such an implication it would have to be disregarded by this Court because it would be completely without legal justification.

Moreover, it is incorrect to say that the decision of the court below now under consideration is not in accordance with "existing state law". The opinion below is not a legislative enactment creating law only for the future. It declares what the law of California was at the time of the acts committed by the defendants in this case. We think a careful reading of the opinion indicates that the Supreme Court of California was holding that the rule it enunciated had been the law of California since the passage of the Jurisdictional Strike Act by the California Legislature in 1947, which abolished the rule of *McKay v. Retail Auto S. L. Union No. 1067*, 1940, 16 Cal. 2d 311. At any rate,

it is incorrect to say that *C. H. Benton, Inc.*, v. *Painters' Union*, 1955, 45 Cal. 2d 677, represented the law of California at the time of the first decision in this case and that the decision now under consideration represents a change in the law. If these two cases are in any way inconsistent, the present case overrules to that extent of the Benton case and establishes that the Benton case was erroneous and never did correctly represent the law of California.

The rule established by the Supreme Court of California in this case represents the law of California. It applies in all cases in which the courts of California have jurisdiction or power to afford any remedy at all. The suggestion that the courts of California are, or ought to be, required to apply some different rule to this case alone because of the mandate of the court is entirely without support in reason or in the law. The further suggestion that the state court in deciding this question of state law was attempting thereby to circumvent the decisions of this Court as to the extent of the jurisdiction of state courts is absurd, irrelevant, and scandalous. It is absurd because the decision can only be applied to cases in which the court under the ruling of this Court has power to grant some relief. It is irrelevant because the power of the state court to determine state law does not depend upon whether it was influenced by decisions of this Court on the question of its jurisdiction. That it is scandalous to level a charge of improper motives against the highest court of one of the sovereign states of the United States with so little foundation needs no proof, and such a charge should not be countenanced by this Court.

CONCLUSION

For the reasons set forth above, the decision of the California Supreme Court was correct and should be affirmed.

Respectfully submitted,

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